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No. 02-1411

In The
Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.*
BRETT ROBY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Petitioner The Boeing Company ("Boeing") and Respondent the United States have each consented to the filing of this brief by *amicus curiae* National Defense Industrial Association ("NDIA"). Because the relator, Brett Roby, has withheld consent, NDIA hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Petitioner.

The National Defense Industrial Association ("NDIA") is a non-partisan, non-profit, international association representing over 1,000 companies and 24,000 individuals from the defense and national industrial bases. NDIA's mission is to provide a forum for the interchange of ideas between the government and industry to address problems of joint concern, including business and technical aspects of the government acquisition and procurement process.

NDIA represents companies and individuals who contract with the government to provide vital military equipment, weapons, and machinery. The High-Value Items Clause ("HVIC") that is implicated in this case is a fundamental part of contracts for the design, manufacture, and delivery of high value items. NDIA members have an interest in the scope of protection afforded by the HVIC and are directly affected by the Sixth Circuit's decision.

The relator's letter responding to NDIA's request for consent to file this *amicus* brief baselessly asserts that this brief is "no more than a second bite at the apple for Boeing."[1]

[1] This letter and other correspondence regarding NDIA's requests for consent have been filed in the office of the Clerk.

Although Petitioner is a member of NDIA, it has not made any financial contribution to this brief's preparation or submission. NDIA's members have their own vital and practical interest in the legal issues raised by this case, particularly the application of the HVIC. NDIA members are many of the very companies who stand to lose the protections intended by this important contract provision. It is notable, moreover, that the United States – which is the real party in interest in a False Claims Act case – has consented to the filing of this *amicus* brief. *See, e.g.*, *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994) (United States is the real party in interest); *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992) (same).

NDIA frequently represents the interests of its members as *amicus curiae* in federal courts. NDIA's background and experience in areas such as the business and technical aspects of the government-industry relationship are highly germane to this case. NDIA submits this brief to illustrate the impact of the Sixth Circuit's decision on the defense industry and on government procurement costs. Certiorari review is needed to correct the Sixth Circuit's erroneous interpretation of the HVIC and to resolve the far-reaching uncertainty occasioned by that decision. Given the ramifications of this case on NDIA members and on the costs of our national defense, NDIA respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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TABLE OF CONTENTS

		Page
I.	INTEREST OF *AMICUS CURIAE*	1
II.	SUMMARY OF ARGUMENT	2
III.	ARGUMENT	4
	A. THE SIXTH CIRCUIT'S DECISION EVISCERATES THE LONG-SETTLED MEANING OF A CRITICAL CONTRACTUAL PROTECTION ON WHICH DEFENSE CONTRACTORS HAVE RELIED FOR DECADES	4
	1. The High-Value Items Clause ("HVIC")	5
	2. History of the HVIC	6
	3. By Upsetting the Long-Established Meaning of the HVIC, the Sixth Circuit's Decision Creates Virtually Unlimited Contractor Liability for Losses that the Government Intended to Self-Insure and Will Significantly Increase Government Procurement Costs	10
	B. THE SIXTH CIRCUIT'S EXPANSION OF THE DAMAGES AVAILABLE UNDER THE FALSE CLAIMS ACT IS UNPRECEDENTED AND UNJUSTIFIABLE	14
IV.	CONCLUSION	16
APPENDIX		App. 1

TABLE OF AUTHORITIES

Page

CASES

Australia v. Lockheed Aircraft Corp., No. 69-1623-WPG (C.D. Cal. Jan. 10, 1972) 6

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 14, 15

United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972) 14

United States v. United States Cartridge Co., 198 F.2d 456 (8th Cir. 1952) 7, 10

STATUTES

31 U.S.C. § 3729(a) 15

31 U.S.C. § 3732(a) 14

RULES

48 C.F.R. § 31.205-19 13

48 C.F.R. § 46.802 5

48 C.F.R. § 46.803(b) 12

48 C.F.R. § 52.246-24(a) 5, 10

48 C.F.R. § 52.246-24(b) 5, 10, 11

Sup. Ct. R. 37.2(b) 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

4 U.S. Comm'n on Gov't Procurement, *Report of the Comm'n on Gov't Procurement* (1972) 8

Defense Procurement Circular 86 (1971) 8

Letter from Council of Defense & Space Indus. Ass'ns, to Captain E.C. Chapman, Chairman, ASPR Committee (Aug. 12, 1971) 8, 9

Mem. from Dep't of the Air Force to the Chmn. of the ASPR Comm. 3 9

Stability Amid Turmoil, Risk & Insurance, no. 5, vol. 13 (Apr. 15, 2002) 13

BRIEF OF NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the National Defense Industrial Association ("NDIA").[1] Petitioner The Boeing Company and Respondent the United States have consented to NDIA's filing of this brief. The relator, Brett Roby, has withheld consent. A motion for leave to file an amicus brief under Supreme Court Rule 37.2(b) is included with this brief. The correspondence regarding NDIA's requests for consent have been filed in the office of the Clerk.

I. INTEREST OF *AMICUS CURIAE*

The National Defense Industrial Association ("NDIA") is a non-partisan, non-profit, international association representing over 1,000 companies and 24,000 individuals from the defense and national industrial bases. NDIA's mission is to provide a forum for the interchange of ideas between the government and industry to address problems of joint concern, including business and technical aspects of the government acquisition and procurement process.

[1] This brief was authored by outside counsel for NDIA. Counsel for NDIA served as co-counsel to Petitioner in the trial court, but do not represent Petitioner in this Court and did not represent Petitioner in the court of appeals. No person or entity, other than NDIA's members, made a monetary contribution to this brief's preparation or submission. *See* Sup. Ct. R. 37.6. Although Petitioner is a member of the NDIA, it has not made any financial contribution to this brief's preparation or submission.

NDIA members support our national defense by contracting with the government to provide vital military equipment, weapons, and machinery. The High-Value Items Clause ("HVIC") is a fundamental part of contracts for the design, manufacture, and delivery of high value items. The government's policy of self-insurance, which is embodied in the HVIC, provides defense contractors important protections from liability. This, in turn, allows the government to enjoy significantly reduced procurement costs when purchasing the military products that form the backbone of our national security.

The Sixth Circuit's decision dramatically undercuts the HVIC. It expands liability for defense contractors and opens the door to correspondingly higher procurement costs for critical military equipment. NDIA submits this brief to illustrate the impact of the Sixth Circuit's decision on the defense industry and government procurement costs, and to argue that certiorari review is needed to correct the Sixth Circuit's erroneous interpretation of the HVIC and to resolve the far-reaching uncertainty occasioned by that decision.

II. SUMMARY OF ARGUMENT

For the last six decades, self-insurance has been a cornerstone of the government's efforts to minimize procurement costs in the critical realm of defense contracting. The High-Value Items Clause ("HVIC") implements this system of government self-insurance by limiting a contractor's liability for loss of government property due to product defects. Because contractors are not liable for such losses, they do not need to purchase

insurance for such losses and, therefore, private insurance costs are not passed on to the government.

The Sixth Circuit's decision runs roughshod over this long-standing system by holding a contractor liable under the False Claims Act ("FCA") for the full value of a sophisticated military helicopter, even though the loss was indisputably caused by a product defect as defined by the HVIC. The Department of Defense long ago made a conscious decision to self-insure such losses even where, as here, they result from alleged fraud by low-level employees.

The exception now created by the Sixth Circuit is nothing less than a judicial overhaul of a half-century of government self-insurance in defense contracting. Because claims based on defective military products can easily be couched as FCA claims, the Sixth Circuit's decision exposes defense contractors to massive liability for which they justifiably have not insured. Likewise, the Sixth Circuit short-sightedly condemns the government to increased future procurement costs, as contractors are forced to seek insurance for this newly imposed potential liability. The Court should grant a writ of certiorari to consider the decision's severe impact on the procurement of military products critical to our national defense – a decision that defies plain meaning, regulatory history, and prior judicial interpretation.

Additionally, the Sixth Circuit's decision contravenes the established principle that the amount of damages available under the FCA, before trebling, cannot exceed the total amount paid by the government on the allegedly false claim. Regardless of the HVIC, allowing the government to recover the full value of a destroyed product is an

unprecedented and unjustifiable expansion of FCA remedies.

III. ARGUMENT

A. THE SIXTH CIRCUIT'S DECISION EVISCERATES THE LONG-SETTLED MEANING OF A CRITICAL CONTRACTUAL PROTECTION ON WHICH DEFENSE CONTRACTORS HAVE RELIED FOR DECADES

Since World War II, the government has adopted a policy of self-insuring vital military products it obtains from manufacturers. The High-Value Items Clause ("HVIC") is a fundamental part of this self-insurance system. The HVIC insulates manufacturers from liability for damage to government property, including the product itself, caused by a defect or deficiency in the product and occurring after delivery to the government. Up until the Sixth Circuit's decision, it was well-settled that the government self-insurance policies embodied in the HVIC protect government contractors from such liability, regardless of whether it is sought to be imposed under the False Claims Act ("FCA") or some other statutory or common law theory.

The Sixth Circuit's decision upsets this decades-long understanding of the HVIC. By allowing the government to recover the full value of a helicopter governed by the HVIC, the decision is directly contrary to the plain meaning, regulatory history, and appellate court interpretation of government contractor self-insurance provisions.

1. The High-Value Items Clause ("HVIC")

The HVIC, one of several limitation of liability regulations, provides that "the Contractor shall not be liable for loss of or damage to property of the Government . . . that . . . results from any defects or deficiencies in the supplies." 48 C.F.R. § 52.246-24(a). The Federal Acquisition Regulations ("FARs") require this clause to be included in every government contract for high-value items.[2] The FARs explicitly state that the HVIC's limitation of liability stems from the government's policy that "it will generally act as a self-insurer" with respect to post-acceptance damages that result from defects or deficiencies in the supplies. *Id.* § 46.803(a).

The only exceptions to the HVIC and the government's policy of self-insurance are expressly listed in the FARs, and the exceptions prove that the regulation was intended to apply in these circumstances. The only possibly relevant exception applies where the defect or deficiency "results from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel." *Id.* § 52.246-24(b). Here, the parties stipulated that there was no such conduct by "managerial personnel," Pet. App. 9a, which the FARs define as a limited subset of the contractor's high-level executives. *See id.* § 52.246-24(b)(1)-(3). NDIA does not dispute that this exception eliminates a contractor's HVIC protection where such executives are guilty of

[2] The FARs define a "high-value item" as one having "a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship," as well as any item designated as a high-value item by the contracting officer. 48 C.F.R. § 46.802.

willful misconduct or bad faith. It necessarily follows, however, that damages arising from such misconduct by employees ***other*** than these top executives are within the purview of the HVIC and may not be recovered under the FCA or any other theory of liability.

2. History of the HVIC

The government's policy of self-insurance, now embodied in the HVIC, began during World War II. In early 1942, the Department of the Navy decided to self-insure the risk of loss or damage to certain complicated structures and machines. *See* Affidavit of H. Struve Hensel (June 4, 1971) ¶ 7 ("Hensel Aff."), Appendix of *Amicus Curiae* NDIA ("NDIA App.") 4-5.[3] The policy was a deliberate response to the costs of insurance that contractors, by necessity, include in the price of military supplies. *See id.* ¶¶ 6-7, NDIA App. 4-5. These prices had become "astronomical," and after studying the issue the Navy decided that self-insurance would be the most economical solution. *Id.* ¶ 6, NDIA App. 4. As one key architect of the self-insurance policy explained:

> [I]f the United States assumed all such risks of loss and eliminated all appropriate costs in respect

[3] This affidavit was prepared in connection with *Australia v. Lockheed Aircraft Corp.*, No. 69-1623-WPG (C.D. Cal. Jan. 10, 1972). Mr. Hensel served in three capacities during World War II: Special Assistant to Under Secretary of the Navy Secretary James Forrestal; Head of the Navy's Office of General Counsel; and Assistant Secretary of the Navy. *See* Hensel Aff. ¶ 3, NDIA App. 2-3. During the Eisenhower Administration, Mr. Hensel served as General Counsel of the Department of Defense and as Assistant Secretary of Defense. *See id.* ¶ 9, NDIA App. 6.

> thereof from the contract price, the contract price would be appreciably lower, since the United States would have a spread of risk unattainable by any private insurance company and the United States would be able to eliminate the overhead expenses, commissions and profit requirements of the private insurance companies.

Id. ¶ 7, NDIA App. 4-5.

Following the war, the U.S. military implemented this policy with respect to all procurement programs. *Id.* ¶ 11, NDIA App. 6-7. Litigation shortly following World War II confirmed to the defense industry that the government's policy of self-insurance relieved a manufacturer from liability for covered damages, even where the government sought to recover such damages under the False Claims Act. Litigation shortly following World War II confirmed that the government's policy of self-insurance relieved a manufacturer from liability for covered damages, even where the government sought to recover such damages under the False Claims Act. In *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952), the government argued that it was free to pursue FCA remedies for alleged quality control lapses in the production of ammunition, despite clear contractual language relieving the contractor of liability for losses that were not the result of high level misconduct. The Eighth Circuit squarely rejected the government's argument that the FCA could provide a remedy for losses that the government, by contract, had agreed to bear. *Id.* at 465.

In 1971, the Department of Defense issued the Armed Services Procurement Regulations ("ASPR"), which formalized the government's practice of self-insurance and were expressly "aimed at reducing Government procurement

costs by limiting the contractor's risk." *Defense Procurement Circular 86* ("DPC 86"), at 1 (1971), C.A. J.A. 434.

This limitation on contractor liability was expansive, covering both contract and tort liability. *Id.*, C.A. J.A. 435 ("[S]ince the policy and the clauses limit liability in terms of loss of or damage to the property of the Government resulting from the deficient supplies . . . no distinction is made between liability founded on contract or in tort."). Such a comprehensive protection was critical to achieve the policy's objectives. Too many exceptions would be "self-defeating," because contractors would require "some continuation of product liability insurance protection for the risk exposure that the Government has not assumed." 4 U.S. Comm'n on Gov't Procurement, *Report of the Comm'n on Gov't Procurement* ("Comm'n Rep.") (1972), C.A. J.A. 406. Consequently, the ASPRs provided that a contractor would be liable only in the event of certain expressly designated conditions.

One exception contained in the original ASPRs provided that the contractor could be liable "when the defects or deficiencies . . . resulted from fraud or gross negligence as amounts to fraud on the part of any personnel of the Contractor." DPC 86, C.A. J.A. 437 (ASPR § 7-104.45(b)). It was soon recognized, however, that this was precisely the kind of self-defeating provision that would thwart the goal of eliminating the cost of contractor liability insurance from government procurement. Accordingly, a group of defense associations urged the Department of Defense to eliminate this exception. *See* Letter from Council of Defense & Space Indus. Ass'ns ("CODSIA"), to Captain E.C. Chapman, Chairman, ASPR Committee (Aug. 12, 1971), C.A. J.A. 464-65. Although defense contractors had accepted the risk of liability stemming from willful or bad

faith misconduct by high-level management personnel, imposing liability based on ***any*** such conduct by ***any*** contractor personnel would create the need for "substantial liability insurance." *Id.* ("Unless ... the exception regarding fraud of any personnel is removed, there is serious question whether DPC 86 implementation will have any real effect upon the cost of Contractor insurance.").

In direct response to this concern, the Department of Defense deleted the fraud exception in 1974. ASPR § 7-104.45(b) (July 1, 1974), C.A. J.A. 485-86. The regulatory history of this change confirms that it was designed to insulate the contractor from liability for "damage to Government Property resulting from defective items and caused by the fraud or gross negligence as amounts to fraud of any personnel of the contractor." Mem. from Dep't of the Air Force to the Chmn. of the ASPR Comm. 3, C.A. J.A. 652.[4]

The current HVIC is virtually unchanged from the 1974 version of the ASPRs, which were intended to protect contractors from liability even where defects stem from fraud by the contractors' employees. There is no subsequent regulatory history indicating any intent to modify the scope of the HVIC. To the contrary, the HVIC's plain terms provide that contractors are not liable for "loss of or

[4] NDIA is a member of CODSIA, the organization that originally urged the Department of Defense to remove the fraud exception. The National Security Industrial Association (which became NDIA when it combined with the American Defense Preparedness Association) was one of CODSIA's founding members. Accordingly, NDIA has a strong interest in ensuring that this significant regulatory change is given effect.

damage to property of the Government (including the supplies delivered under this contract) that . . . results from any defects or deficiencies in the supplies." 48 C.F.R. § 52.246-24(a). Although the government does not bear the risk of losses stemming from fraudulent conduct by the contractor's high-level managerial personnel, *id.* § 52.246-24(b), it has consciously accepted risks that might result from the fraud of other personnel, in order to accomplish the overriding objective of minimizing procurement costs.

3. By Upsetting the Long-Established Meaning of the HVIC, the Sixth Circuit's Decision Creates Virtually Unlimited Contractor Liability for Losses that the Government Intended to Self-Insure and Will Significantly Increase Government Procurement Costs

1. NDIA members who contract with the government have relied for decades on the plain language and purpose of the HVIC, which precludes recovery for damages to government property stemming from "defects or deficiencies in the supplies." *Id.* § 52.246-24(a). In accordance with the HVIC and the government's general policy of self-insurance, contractors have not insured against such liability, and therefore have not passed corresponding insurance costs on to the government.

The Eighth Circuit's decision in *U.S. Cartridge* made clear that the government's practice of self-insurance, embodied in the HVIC, also prevents recovery of such damages under the FCA. The 1974 amendments to the procurement regulations confirm that the HVIC applies to damages resulting from fraud by contractor employees other than high-level executives. In the instant case, however, the Sixth Circuit concluded that the HVIC

provides no protection because the loss "was actually caused by Boeing's initial misrepresentation that the helicopter conformed to contract requirements." Pet. App. 9a-10a. Fraud by lower-level employees that results in a defective product necessarily also results in a product that is out of conformity with contract requirements. Yet such fraud does ***not*** eliminate the HVIC's protections.[5] The Sixth Circuit's ruling is in conflict with that of the Eighth Circuit and ignores the Defense Department's conscious decision in 1974 to limit the fraud exception.

2. Although the Sixth Circuit's opinion is limited to FCA claims, it could create nearly unlimited liability for contractors with respect to losses that the HVIC purportedly covers. A claim arising from "defects or deficiencies" is easily cast as an FCA claim based on the allegation that the contractor misrepresented the product's conformance with contract requirements. *See, e.g.*, Pet. App. 29a-30a (noting that plaintiff's FCA claims are based on allegation that Petitioner had "falsely represented that the contracted helicopters conformed to all of the specified contract requirements."). Accordingly, ***every*** defective or deficient product can potentially give rise to an FCA claim where, as here, the contractor has allegedly certified such compliance. The Sixth Circuit's judicially created exception for FCA claims, therefore, would substantially nullify the protections afforded by the HVIC.

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[5] It is stipulated in this case that there was no willful misconduct or lack of good faith by managerial personnel. Pet. App. 9a; *see* 48 C.F.R. § 52.246-24(b).

Moreover, the Sixth Circuit's logic could eliminate HVIC protection for all non-contractual bases for liability. The Sixth Circuit agreed that the loss of the helicopter in this case satisfied the core elements of the HVIC: "the loss of the helicopter occurred after Government acceptance and resulted from the defective Speco gear." Pet. App. 9a. Nonetheless, the court held that the HVIC's clear limitation on contractor liability could be evaded because the loss "was actually caused by Boeing's initial misrepresentation that the helicopter conformed to contract requirements." Pet. App. 9a-10a. On this logic, the fact that a defect caused the loss is irrelevant, so long as the government can point to some additional theory of liability. In fact, counsel for the government endorsed this position in its briefs below, arguing that the "High Value Items Clause applies solely to 'contractual liability.'" Br. of Plaintiff-Appellee the United States at 22 (quoting 48 C.F.R. § 46.803(b).

3. The uncertainty occasioned by the Sixth Circuit's decision will have a widespread impact on the defense industry and the government's ability to keep procurement costs low, at a time when our national security can ill afford such consequences. The Sixth Circuit's decision exposes defense contractors to massive liability that they justifiably have not insured in light of the HVIC. In addition, the Sixth Circuit's decision will substantially increase the costs of future government procurement. The decision puts defense contractors in the position of seeking to purchase insurance for losses that previously had been covered by the HVIC. Ultimately, the costs of this insurance will be passed on to the government, resulting in exactly the higher procurement costs that the HVIC seeks

to avoid. 48 C.F.R. § 31.205-19 (allowing inclusion of insurance costs).[6]

These insurance costs will be substantial, because the added costs of insurance will be factored in at each stage of the "procurement pyramid." The Sixth Circuit's evisceration of the HVIC impacts not only prime contractors, but also lower tier subcontractors and suppliers. Thus, companies at every level of the manufacturing process may obtain insurance to cover a single risk. If this happens, then the increased cost to the government for the contract deliverable will be exponential rather than incremental. This exponential cost increase will be exacerbated by the fact that insurance premiums have increased since the September 11th attacks. *See Stability Amid Turmoil*, Risk & Insurance, no. 5, vol. 13, at 62 (Apr. 15, 2002) (noting that property and liability insurance premiums increased an average of twenty to fifty percent after September 11th).

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[6] Section 31.205-19 states in pertinent part:

> (2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable, subject to the following limitations:
>
> * * *
>
> (iv) Costs of insurance for the risk of loss of or damage to Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance does not cover loss or damage that results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers or other equivalent representatives.

48 C.F.R. § 31.205-19.

Finally, the impact of the Sixth Circuit's decision will be felt nationwide, not merely in the four states that comprise the Sixth Circuit. The FCA allows actions to be brought anywhere a defendant transacts business. *See* 31 U.S.C. § 3732(a). Thus, major contractors who transact business nationwide must presume that they will be subject to the Sixth Circuit's rule and will be forced to purchase insurance for these newly created risks. Also, FCA claimants (whether individual relators or the government itself) may select Sixth Circuit fora to bring FCA claims involving the HVIC clause, and this will reduce the likelihood that other federal appellate courts will have the opportunity to consider the issue. Accordingly, the implications of the Sixth Circuit's decision require prompt guidance from this Court. It is critical that the Court review a question that is so vital to the government's defense procurement and the companies that support our national defense.

B. THE SIXTH CIRCUIT'S EXPANSION OF THE DAMAGES AVAILABLE UNDER THE FALSE CLAIMS ACT IS UNPRECEDENTED AND UNJUSTIFIABLE

The NDIA also agrees with Petitioner that the amount of damages available under the False Claims Act ("FCA"), before trebling, cannot exceed the total amount paid by the government on the allegedly false claim. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) ("[T]he chief purpose of the [FCA] was to provide for restitution to the government of money taken from it by fraud."); *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972) ("[A] proper application of the [FCA] damage provision limits the government's claim to the amount that was paid

out by reason of the false claim."). Accordingly, certiorari is required to correct the Sixth Circuit's erroneous expansion of the FCA to allow the government to recover the full value of the product at issue, regardless of the amount of the contractor's claim for payment. The expanded scope of FCA liability exacerbates the concerns discussed *supra* regarding the suddenly increased liability facing defense contractors and the higher procurement costs stemming from the need for contractors to insure against future losses.

The government already has at its disposal a substantial arsenal of remedies, such as debarment, suspension, FCA statutory penalties, fees and costs, *see* 31 U.S.C. § 3729(a), as well as any contractual and warranty rights that it negotiates. FCA damages have never included recovery for the full value of a destroyed product. Rather, FCA damages have historically been limited to recovery of payments made as a result of the false claim. *See Hess*, 317 U.S. at 551-52. The Sixth Circuit's decision directly contravenes the established scope of FCA damages.

IV. CONCLUSION

As argued by the Petitioner, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF H. STRUVE HENSEL

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

H. STRUVE HENSEL, being duly sworn, deposes and says:

1. Since 1925 I have been admitted to practice law before the highest Court of the State of New York. Since 1943 I have been admitted to practice before the United States District Court for the District of Columbia. I have actually been engaged in that practice of law in such State and District since such dates, respectively, except for two periods of service with the United States Government – the first being from December 1940 to March 1946 with the Department of the Navy and the second being from January 1953 to June 1955 with the Department of Defense.

2. In this case I have been consulted by and advised Menasco Manufacturing Co. both as to the law and facts and as attorney for said defendant I have examined certain witnesses in depositions taken herein. At the same time, I am, to the best of my knowledge and belief, the only living official of the Department of the Navy who participated with the late Under Secretary of the Navy James Forrestal in establishing at the start of World War II the practice and policy of the Department of the Navy with respect to the assumption of risk by the Navy Department as to loss of or damage to end products by reason

of defects or deficiencies in components and the elimination of all insurance premiums or contingency allowances in respect of said risk from the prices paid for such end products by the Navy Department.

3. The service with the Department of the Navy commenced in December 1940 when I became a Special Assistant to Under Secretary of the Navy James Forrestal, in the course of which work I made, at his request, certain recommendations with respect to the practices and procedures to be followed in negotiation and preparation and signing of contracts for materiel and facilities by the Department of the Navy. Such recommendations which were made during March 1941 resulted in the establishment of a legal office, known as the Procurement Legal Division, in the office of the Under Secretary of the Navy and my appointment in July 1941 as Chief of such Division. The Procurement Legal Division of which I was the head was a separate legal office operated and controlled by civilians, entirely separate from the Office of the Judge Advocate General and concerned with rendering all legal services in respect of the procurement of materiel, including the negotiation, preparation, execution and administration of contracts with respect to such procurement. This was a complete innovation insofar as United States Government practice was concerned in that the equivalent of a self-contained law office or firm was created in the Department of the Navy to work on a lawyer-client relationship with the various procurement Bureaus of the Navy, with all lawyers reporting only to the head of the Procurement Legal Division and the head of that Division reporting only to the Under Secretary of the Navy. For a period of time, the members of the Procurement Legal Division, all of whom had experience in the practice of

commercial law, acted also as business advisors to the Under Secretary and the Bureaus and as negotiators of contracts in the various procuring Navy Bureaus. In August 1944 the name of the Procurement Legal Division was changed to the Office of the General Counsel for the Department of the Navy with, to quote the pertinent directive of the Secretary of the Navy "cognizance of all legal matters relating to the procurement or disposition of Naval materiel and facilities and such other legal duties as may be assigned * * * by the Secretary of the Navy, the Under Secretary or the Assistant Secretary for Air." I, as head of the Office of General Counsel, was designated as the General Counsel for the Department of the Navy, which position I held until January 30, 1945, when I became Assistant Secretary of the Navy with administrative cognizance over the procurement and disposition of materiel and facilities which cognizance had been previously exercised by James Forrestal, the Under Secretary of the Navy. I served as such Assistant Secretary of the Navy until March 1, 1946, when I resigned and returned to the private practice of law in New York City as a senior partner of the law firm of Carter, Ledyard & Milburn.

4. As Chief of the Procurement Legal Division and General Counsel of the Navy Department immediately preceding and during World War II, I participated actively as Under Secretary Forrestal's advisor in a complete reorganization of the procurement practices and contract forms in vogue at that time.

5. One of the problems encountered at the start of World War II in the procurement of materiel and facilities was the practice, dictated in part by statute, of requiring performance bonds in the construction of facilities and long term warranties of conformance to specifications and

freedom from defects with respect to supplies. This was very expensive for the United States as the costs of insurance and allowances for contingencies in respect thereof were included in the contract price or prices and paid for by the United States. It is axiomatic that all risks assumed by a manufacturer and seller must be covered by the contract price or the manufacturer and seller is soon out of business.

6. As the volume of procurement mushroomed from the millions of dollars into the billions, the cost of such insurance and allowances for such contingencies became astronomical. I became impressed with the mounting cost of insurance included in contract prices and it seemed to me that as the spread of risk to insurance companies greatly increased, the premium rate per $1.00 of insurance should have decreased, but such was not the case. I can remember calling a meeting of selected insurance brokers and representatives of insurance carriers which was held in Washington some time – according to my best recollection – before the outbreak of the war. At such meeting, I made a plea for reduced insurance premium rates in view of the increased spread of risk. When such reduction was refused, Under Secretary Forrestal ordered a study of the need for insurance and the most economical method of protecting the Navy against the inescapable risk of loss and damage.

7. The problem was studied and analyzed as solely a question of price, i.e., would it be ultimately cheaper to continue to impose the risk of loss on the contractor with the cost of such assumption being included in the contract price or would it be cheaper for the United States to eliminate all insurance and contingencies of that type from the contract prices and to assume the risk of loss

itself? It was recognized that insurance premiums would have to include all losses and also provision for brokerage commissions, insurance company overhead and profit and that such premiums would have to be included in the price paid by the Navy. Almost as soon as the problem was stated it became apparent that, if the United States assumed all such risks of loss and eliminated all appropriate costs in respect thereof from the contract price, the contract price would be appreciably lower, since the United States would have a spread of risk unattainable by any private insurance company and the United States as self-insurer would be able to eliminate the overhead expenses, commissions and profit requirements of the private insurance companies. As a result, I recommend to Under Secretary Forrestal that title to complicated structures and machines such as buildings, ships, airplanes and the like be vested in course of construction and manufacture in the United States and that the United States assume the risk of loss with respect to such complicated structures and machines and eliminate from contract prices all costs of insurance against such risks by the contractor. Such policy was adopted for the Department of the Navy by its Under Secretary early in 1942. Insurance costs against loss and damage from defects in end products and components were excluded from allowable costs in cost-plus-fixed-fee types of contracts and from the negotiated prices in fixed-price contracts. As a result, the United States Navy thereafter became the equivalent of a self-insurer (without creating any separate insurance fund) with respect to the loss and destruction of supplies and equipment inspected and accepted by the United States Navy in the performance of procurement contracts. Such policy continued throughout the war.

8. During the war, the Forrestal administration established its procurement procedures and practices by word-of-mouth, frequent staff meetings and the selection of personnel with a common background of education and commercial experience. The concept which later led to the establishment of the comprehensive set of prescribed contract clauses and detailed prescription of contract administration embodied in the current Armed Services Procurement Regulations was opposed in the Department of the Navy at that time. The Navy operated its materiel and facilities procurement with a minimum of written directives and circular letters. Nevertheless, attached hereto as Exhibit 1 is a circular letter dated August 6, 1942, and signed by Admiral S. M. Robinson, Chief of Procurement and Material. which sets forth certain practices directed to be followed with respect to the assumption of risks and attached hereto as Exhibit 2 is a letter dated 1 April 1944 and signed by Capt. Gokey in the Bureau of Ships, Department of the Navy, and sent to contractors with the Navy with respect to the same subject matter, i.e., the assumption of risk by the Navy and the elimination of insurance premiums from contract prices.

9. Shortly after the election of President Eisenhower in 1952, I was asked to become General Counsel of the Department of the Defense, which I did in January 1953. Such Office of the General Counsel of the Department of Defense was organized at that time along lines similar to those I had recommended and followed in the organization of the Office of the General Counsel of the Department of the Navy during World War II, except that, in addition to cognizance of legal matters concerning the procurement and disposition of materiel and facilities, I was the general legal advisor to the Secretary of Defense. I held that

position until the spring of 1954 when I became Assistant Secretary of Defense in charge of International Security Affairs with cognizance over the foreign military aid program running into the billions of dollars and the relations between the Department of Defense and the Department of State, from which position I resigned as of June 30, 1955.

10. As General Counsel of the Department of Defense, I was in charge of all legal services rendered in the military departments in respect of the procurement and disposition of materiel and facilities. Pursuant to my recommendation, Trowbridge vom Baur was appointed General Counsel of the Department of the Navy and he served in that capacity from December 15, 1953, to April 30, 1960.

11. Between my resignation from the Navy in 1946 and my entering service in the Department of Defense in 1953, my practice kept me in contact with procurement policies in the military departments and, to the best of my knowledge and belief, the same policy continued in all such departments excluding the cost of insurance against loss of the supply item from both cost-plus-fixed-fee and fixed-price contracts and the suppliers of materiel to the military departments entered into contracts with such military departments at prices which excluded all insurance or contingency allowances against such risk of loss. It was also generally understood in the negotiation of military contracts that the sole liability of any contractor in respect of a defective part or component was to replace or correct that defective part or component and no one ever thought that a defective part meant that the entire item was defective.

12. Following my resignation from the Department of the Defense in 1955, I practiced law in Washington, D.C. on various bases, part of the time as a single practitioner, part of the time as a joint venturer with Simpson, Thacher & Bartlett of New York City and part of the time as a partner of Trowbridge vom Baur. In September 1966, I became a partner in the New York City, Washington, Paris and London firm of Coudert Brothers and am still engaged in the practice of law with that firm, with offices at 200 Park Avenue, New York, New York 10017. From time to time, I have advised contractors with the various military departments and, since 1966 I have been general counsel to the National Security Industrial Association, a non-profit association of military contractors organized by James Forrestal in World War II to advise, first, the Navy Department and, then, on its formation, the Department of Defense, with respect to the most satisfactory commercial practices and procedures in respect of military procurement. At no time prior to April 11, 1968 have I heard anyone in or out of the Department of Defense suggest that there had been any change in the policy of the assumption of risk by the military departments and the elimination of insurance premiums from contract prices as described above in paragraphs 7 and 11.

DATED: June 4, 1971.

/s/ Hensel
H. Struve Hensel

SUBSCRIBED AND SWORN to before me this 4th day of JUNE, 1971.

SIGNATURE: /s/ Ann Bushong
(Name typed or printed)

Notary Public in and for said County and State.

My Commission Expires:

ANN BUSHONG
Notary Public, State of New York
No. 31-5550300
Qualified in New York County
Commission Expires March 30, 1972

REPLY

BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* BRETT ROBY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Cook County v. *United States ex rel. Chandler*, 123 S.Ct. 1239 (2003) 9
Leo Sheep Co. v. *United States*, 440 U.S. 668 (1979) 2
Shutte v. *Thompson*, 82 U.S. (15 Wall.) 151 (1872) 5
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 1
United States v. *Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972) 7, 9, 10
United States v. *Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001) 3
United States v. *Bornstein*, 423 U.S. 303 (1976) ... 8, 9
United States v. *United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952) 3, 5
United States v. *Winstar Corp.*, 518 U.S. 839 (1996) 5
United States v. *Woodbury*, 359 F.2d 370 (9th Cir. 1966) 10
White v. *Western Title Ins. Co.*, 710 P.2d 309 (Cal. 1985) 1

REGULATIONS

48 C.F.R. § 46.803 ..... 3, 4
§ 52.246-24 ..... 1, 3, 4
46 Fed. Reg. 40,221 (Aug. 7, 1981) 4

OTHER AUTHORITIES

Armed Serv. Procurement Regulations § 7-104.45(b)(1) (1971) 2
DAR-FAR Comparison Spread Sheet for Part 46 .. 4
Defense Procurement Circular 86 (1971) 2, 3
Settlement Agreement 8
4 U.S. Comm'n on Gov't Procurement, *Report of the Commission on Procurement* (1972) 2

REPLY BRIEF

The petition demonstrated that the rulings below contravene the plain language of the High-Value Item Clause ("HVIC") and the False Claims Act ("FCA"), conflict with decisions of other courts, and effect a massive shift of business risk from the government to private industry in derogation of longstanding federal policy. Respondents' arguments, notable for what they ignore, do nothing to cast doubt on the worthiness of this case for review by the Court.

I. A. Respondents' arguments cannot be reconciled with – and indeed disregard – the plain meaning, the history, and the purpose of the HVIC. The HVIC provides that "the Contractor *shall not be liable for loss of or damage to* property of the Government (including the supplies delivered under this contract)" due to product defects. 48 C.F.R. § 52.246-24(a) (emphasis added). Respondents claim that the Government should not be deemed to have self-insured against fraud, but the above-quoted language expressly shields the contractor from *any* kind of damages resulting from product defects, with only one exception not involved here: those caused by the "willful misconduct or lack of good faith" by the contractor's most senior management. *Id.* § 52.246-24(a), (b). The HVIC on its face thus necessarily covers damage to high value items arising from fraud or gross negligence by any other contractor employees. As Judge Boggs stated in dissent, "the Government [is] trying to do exactly what the plain and obvious wording of its contractual term says it will not do: recover from 'the Contractor' for the 'loss of or damage to property of the Government.'" Pet. App. 20a.[1]

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[1] The *express* exclusion of senior management misconduct means that there can be no additional *implied* HVIC exclusions, for FCA violations or otherwise. Pet. App. 23a (Boggs, J., dissenting); *see also TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (if express exceptions are enumerated, "'additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'"); *White* v. *Western Title Ins. Co.*, 710

Notwithstanding the HVIC's plain meaning, respondents insist that its limitations do not apply to "liability under sources of law other than the contract itself," U.S. Opp. 8. Remarkably, respondents maintain this position without even mentioning the history of the HVIC. That history shows that the clause purposefully was drafted to shield contractors from paying product-defect damages regardless of the nature of the legal claim asserted. The Defense Department intentionally worded the HVIC "in terms of liability arising from supplies delivered to the Government," rather than referencing specific legal claims, and thus drew "no distinction ... between liability founded in contract and in tort." *Defense Procurement Circular 86*, at 2 (1971) ("*DPC 86*"), C.A. J.A. 435. This is because "fragmentation of the policy of Government self-insurance by numerous exclusions ... is self-defeating because it necessitates some continuation of product liability insurance protection for the risk exposure that the Government has not assumed." 4 U.S. Comm'n on Gov't Procurement, *Report of the Commission on Procurement* 96 (1972), C.A. J.A. 406.

Most fundamentally, when the Government amended the HVIC in 1974, it consciously chose to assume the risk for losses arising from fraud and gross negligence – the very conduct that violates the FCA. As originally drafted, the HVIC expressly excluded not only losses from senior management misconduct and bad faith, but also losses from "fraud or gross negligence as amounts to fraud, on the part of any personnel of the Contractor." ASPR § 7-104.45(b)(1) (1971), *in DPC 86*, at 3, C.A. J.A. 437. Had that exception survived, it would have covered liability for damages under the FCA and for common law fraud. Yet, in response to defense industry comments that companies would be forced to insure against fraud of lower-level personnel and thus increase procurement costs, the Defense Department

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P.2d 309, 314 n.4 (Cal. 1985) (same canon applies to contracts); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669 (1979).

eliminated the exception. Pet. 5-6; Br. of National Defense Industry Ass'n ("NDIA") 6-10. Failing even to acknowledge this history, respondents contend that there must be "very clear" contractual language before the Government will be "presumed" to self-insure for losses arising from fraud. U.S. Opp. 9. They cite no authority for such a standard,[2] but in any event it is well satisfied by the crystal clear language of the HVIC, as confirmed by the record of the Department's unmistakable intent. Pet. App. 20a (Boggs, J., dissenting).

Respondents base their argument, not on the operative language of the HVIC that limits contractor liability and defines exemptions, but on the prefatory phrase "notwithstanding any other provision of this contract" that appears in the HVIC, 48 C.F.R. § 52.246-24(a). U.S. Opp. 8. This phrase does not remotely suggest a broad exemption of noncontract damages from the HVIC, much less overcome the rule that exceptions may not be implied beyond those enumerated. It simply clarifies that no warranty or other clause in the contract derogates from the HVIC; this is evident from the predecessor version, which provided that "[n]otwithstanding any other provision of this contract, including specifically the 'Inspection' clause and any 'Warranty of Supplies,' 'Correction of Deficiency' or other warranty clause, the Contractor shall not be liable ...." *DPC 86*, at 4, C.A. J.A. 437. The phrase is intended to prevent contracting officers from undercutting the HVIC by specifying other contract remedies.

Similarly unsound is respondents' reliance on the reference to "contractual liability" in the policy statement of 48 C.F.R.

[2] The authority that exists is to the contrary. *See United States* v. *United States Cartridge Co.*, 198 F.2d 456, 460-61 (8th Cir. 1952) (enforcing broad assumption-of-risk clause nearly identical to the HVIC to preclude FCA liability – notwithstanding that the contract did not expressly reference fraud or the FCA); *United States* v. *Bankers Ins. Co.*, 245 F.3d 315, 324 (4th Cir. 2001) ("The Government should comply with its contractual obligations, and it cannot avoid them merely by invoking a statutory civil claim, such as one contemplated under the FCA.").

§ 46.803(b). First, as Judge Boggs noted, this phrasing "does not appear in the form contract language set out in the regulations, 48 C.F.R. § 52.246-24, or in the parties' contract (which incorporated the form language)." Thus, respondents cannot invoke the policy statement, a form of parol evidence, to vary contract terms. Pet. App. 21a n.1. Indeed, the policy statement itself provides that, if it conflicts with the specific contract term, the contract will control. 48 C.F.R. § 46.803(d). Second, as Judge Boggs further observed, the term "contractual liability" in context means any liability that "arise[s] out of a relationship between the parties that is based in contract." Pet. App. 21a n.1. The FCA liability claimed here undoubtedly arises from the performance of the contract: respondents alleged that Boeing submitted a false claim for payment under a contract because the gears failed to comply with contract specifications.[3]

Giving the HVIC its intended effect also does not "undermine Congress's efforts, in amending the FCA in 1985 and 1986, to combat fraud in military contracting," U.S. Opp. 9. "The HVIC does not overwrite or preempt the FCA by relieving contractors of liability for fraud." Pet. App. 21a (Boggs, J., dissenting). It simply holds the Government to its bargain of assuming the risk of property loss from defective supplies in order to reduce procurement costs, regardless of whether the FCA or any other law authorizes the Government to recover damages for that loss.[4]

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[3] Moreover, the respondents' contrary interpretation is inconsistent not only with the history of the HVIC, Pet. App. 21a n.1. (Boggs, J., dissenting), but also with the drafting history of the policy statement itself. The "contractual liability" language, which did not appear in the prior Department of Defense policy statement, was added at the time of the codification of the FAR simply to "conform to [Office of Federal Procurement Policy] guidelines," and no substantive change was intended. DAR-FAR Comparison Spread Sheet for Part 46, C.A. J.A. 683-85; 46 Fed. Reg. 40,221 (Aug. 7, 1981).

[4] The relator's principal HVIC argument – that a party by contract cannot release or limit rights conferred by statute, but only rights given by

It is notable that the Sixth Circuit, citing the history above, did not embrace the respondents' strained construction of the HVIC as encompassing only liability in contract. Pet. App. 7a-9a. The Sixth Circuit instead implied a more limited exemption for "statutory violations," *id.* at 10a, but its ruling likewise has no colorable warrant in the text or history of the clause, and is in conflict with other circuits. See *supra*, n.2. The disarray reflected in these conflicting Government and judicial interpretations regarding one of the most critical regulations governing major federal procurement contracts underscores the need for this Court's review.

B. Respondents fail to rebut the conflict of decisional authority demonstrated in the petition. The Eighth Circuit held, in direct conflict with the decision below, that where the Defense Department has statutory authority to allocate risk, and has assumed the risk of damages without excluding fraud, a contractual limitation clause must be enforced to limit FCA damages, even though the FCA is not specifically referenced in the contract. *United States* v. *United States Cartridge Co.*, 198 F.2d 456, 465 (8th Cir. 1952). Respondents deny a split, but they rely on distinctions without a difference. They argue that the *Cartridge* contract was authorized by a different statute, but do not contest that the Department's present statutory authority (Pet. 16) is equally broad. They make too much of the Eighth Circuit's emphasis on the "unconventional" Government supervision of the contractor's operations. U.S. Opp. 11. While unconventional in 1940, such supervision is standard now, and the production of the Speco gears here was monitored on-site by Government quality assurance representatives. The exigencies of war did create special liability risks for the contractor in *Cartridge*, 198 F.2d at 463, but the exigencies of modern warfare and modern procurement (hugely expensive, complex weapons

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the contract itself, Roby Opp. 7-10 – is legally wrong. *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit"). *See also United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (plurality).

systems built by a multitude of contractors and workers) likewise create substantial risks of FCA liability that companies would not assume without costly insurance.

C. The ramifications of the decision below justify certiorari independently of the circuit conflicts. Respondents do not deny that the rule below exposes contractors to potentially billions of dollars of uninsured risk under *existing* contracts. Their pat claim that contractors could not reasonably rely on the HVIC is refuted by its plain meaning and history, by *Cartridge*, and by the *amici curiae*. Respondents also wrongly contend that there is no windfall to the government; it, however, avoided paying contractor charges for insurance costs that otherwise would have been incurred. Nor are respondents' arguments regarding prospective effects persuasive. Their claim that few contractors will be affected by having to bear the risk of liability for "knowing fraud" is disingenuous. The FCA defines "knowing" to include "reckless disregard," which the Government contends is satisfied by gross negligence. Pet. 19. Even the most responsible and prudent contractor cannot completely eliminate the possibility of manufacturing defects in its own operations or those of its suppliers at any tier. Under the Sixth Circuit's interpretation of the HVIC and the FCA, it is but a short leap from such defects to allegations of gross negligence and the threat of treble damages liability under the FCA. That means the contractor must either purchase insurance, raise prices, or exit. Respondents claim it is the Government's prerogative to weigh and allocate those risks, but the government agencies that promulgated the HVIC already did so. The Government may change the policy, but only prospectively (since it cannot abrogate existing contracts) and then, by rulemaking. It remains imperative that this Court resolve the meaning of the HVIC, which is incorporated in every major procurement contract, and which allocates the huge risks associated with

modern weapons, space, and other systems between the government and private industry. See NDIA Br. 10-14.[5]

II. A. The Petition showed that the holding below, that FCA damages are not limited to "the amount wrongfully paid to satisfy the false claim," *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972), independently warrants review. Pet. 22-30. Mustering little substantive argument in response, respondents attempt to hide behind their faulty construction of the August 3, 2000 Settlement Agreement as a reason not to decide this issue. Respondents contend that, even if Boeing had won in the Sixth Circuit as to the FCA measure of damages, Boeing nevertheless would have "lost" under the Agreement and would have owed the additional $15 million. See, *e.g.*, U.S. Opp. 13-16. The Government asserts that, consequently, the Sixth Circuit's ruling on FCA damages "does not warrant this Court's review ... because it has no bearing on the proper disposition of [this] case." *Id.* at 14. The relator asserts that this renders the Petition "moot." Roby Opp. 19. These contentions are wrong for several reasons.

First, respondents' construction of the Settlement Agreement is contrary to its plain language. The first clause of the provision they cite – a clause which the Government does not discuss and which the relator does not even *disclose* in the text of his brief – states clearly that Boeing will be deemed to be the "prevailing party" if the court of appeals (or

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[5] The relator's brief brims with invective and outright misrepresentations that are irrelevant to the questions presented. Boeing vigorously denies these accusations. During five years of litigation, no evidence was ever developed supporting the meritless accusation that Boeing knowingly installed defective gears in any aircraft. The dispute concerns whether Boeing adequately supervised a subcontractor's manufacturing and inspection processes. Boeing replaced the few gears found to have microscopic grinding cracks; there has been no mishap involving Speco gears for over a decade; and the Army has since ordered hundreds of additional gears from Boeing made to the same specifications with the same alloy. Moreover, the Honduras mishap referenced by relator (Roby Opp. 3 n.1) did not involve a Speco gear, and the Army found no gear defect.

this Court) holds "that the United States cannot recover damages under the False Claims Act *for loss of a helicopter* resulting from the failure of a defective flight – critical component part." Settlement Agreement ¶ 2.h.i.(a) (Roby App. 8-9) (emphasis added.) Boeing argued below (and argues here) that the Government cannot recover for the loss of the entire helicopter, but instead is limited by the language of the FCA to the amount paid out by reason of the alleged false claim. If this Court agrees, Boeing will indisputably be the "prevailing party" under the Settlement Agreement.

Second, because of the disjunctive "or" between the first and second clauses of ¶ 2.h.i.(a), as long as Boeing is deemed to be the prevailing party under the first clause, discussed above, the meaning of the second clause (on which respondents' arguments are entirely based) is irrelevant.[6]

Third, the mere possibility that the respondents might on remand argue that they have prevailed under the Settlement Agreement (see *id.* ¶ 2.h.iii., Roby App. 10) even if they lose in this Court is not a credible basis for avoiding review of the critical, but plainly incorrect, ruling below.

B. Respondents' other arguments concerning the FCA measure of damages are equally unavailing. For example, while contending that the decision below is consistent with this Court's ruling in *United States* v. *Bornstein*, 423 U.S. 303, 316 n.13 (1976), the respondents make no attempt to refute Boeing's point (Pet. 28-29) that no court, in the 27 years since *Bornstein* was decided, has ever extended the FCA measure of damages articulated in that case to

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[6] In any event, respondents misconstrue the second clause. Boeing did not advocate a position below that would cause it to pay an additional $15 million even if the Sixth Circuit ruled in Boeing's favor. The terms "contract value or price" that parenthetically qualify "value of the helicopter" refer to the contract price of a new helicopter (the measure of damages advocated by respondents, Pet. App. 19a), not to the contract price of the remanufacturing contract. Boeing would prevail under the second clause as well if this Court were to adopt the *Aerodex* rule.

encompass the type and extent of damages that the Sixth Circuit's decision would allow here. Indeed, the relator concedes this point. Roby Opp. 25-26. The FCA is a statute addressing false claims, not products liability.[7]

Moreover, the Government's attempt to distinguish *Aerodex* misses the mark. *See* U.S. Opp. 17-18. *Aerodex* holds that "damages under the False Claims Act must be measured by the amount wrongfully paid to satisfy the false claim." 469 F.2d at 1011. Contrary to the Government's contention (see U.S. Opp. 18), the phrase "[i]n a case of this kind," which qualifies the sentence quoted above, in no way limits the *Aerodex* rule to that one case. Instead, the "kind" of case referred to is an FCA case like this one, in which the Government seeks "consequential damages incurred as a result of the delivery of defective goods." 469 F.3d at 1011.[8]

Relator's Opposition tries to avoid the circuit conflict by suggesting that all FCA cases are limited to their facts: "[n]either the Fifth Circuit in *Aerodex* nor any other court has

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[7] In response to Boeing's position that FCA damages are limited to "recovering money the government was fraudulently induced to pay," (Pet. 25), the relator asserts – without citing any authority – that "[t]his completely misstates the purpose of the FCA." Roby Opp. 21. Boeing's position, however, fulfills precisely the "'chief purpose'" of the FCA damages provision as articulated by this Court: namely, "'to provide for restitution to the government *of money taken from it by fraud*.'" *Bornstein*, 423 U.S. at 314 (emphasis added).

[8] The Government fails even to address Boeing's argument (*see* Pet. 26-28) that Congress, in amending the FCA in 1986, declined to overrule *Aerodex*, and thus declined to make damages like those here recoverable. While the relator suggests that the reasons for deleting the proposed consequential damages provisions are a mystery (Roby Opp. 27-29), this Court recently explained that Congress in 1986 allowed trebling of baseline damages as a "substitute" for consequential damages. *Cook County* v. *United States ex rel. Chandler*, 123 S.Ct. 1239, 1247 n.9 (2003). Neither respondent addresses petitioner's point that the damages allowed by the Sixth Circuit here would exceed even those contemplated by the proposal Congress rejected in 1986, by allowing damages for the loss of the entire helicopter *before* trebling. *See* Pet. 27-28.

either established or even hinted at a 'rule' restricting FCA damages *in every case* to the amount of the false claim." Roby Opp. 17-18 (emphasis added). The Fifth Circuit in *Aerodex*, however, stated: "Upon careful analysis, we hold that the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods." 469 F.2d at 1011. The Ninth Circuit stated in *United States* v. *Woodbury*: "Ordinarily the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." 359 F.2d 370, 379 (9th Cir. 1966). These courts clearly articulate generally applicable principles intended to extend beyond the four corners of the cases before them. And the principles stated irreconcilably conflict with the Sixth Circuit's erroneous holding in this case.

Relator's central thesis seems to be that the Court should embrace, not resolve, these conflicts; that there are not and should never be any "rules" governing this arena, only "flexibility." Roby Opp. 20-21. To be sure, the determination of damages involves a fact-specific, case-by-case inquiry, but the analysis still must be bounded by clear legal principles that are required by the statutory language and applied uniformly by the federal courts. See Pet. 25 (analyzing statute). The cases cited by relator as exemplars of a desirable "flexibility" (see Roby Opp. 29 & n.20) only underscore the uncertainty, confusion and incentives to forum shop that prevail in this area. This Court, therefore, should clarify what damages are available under the FCA.

CONCLUSION

The petition for writ of certiorari should be granted.

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